TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 209

[redacted]LLARD, SUTHERLAND & COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 17, 1921.

(28,576)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 621.

WILLARD, SUTHERLAND & COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., February 23, 1922.

1 In the Court of Claims of the United States.

No. 34222.

WILLARD, SUTHERLAND & COMPANY

vs.

THE UNITED STATES.

1. *Petition.*

Filed November 4, 1919.

To the Honorable the Chief Justice and the Judges of the Court of Claims of the United States:

The Claimant, Willard, Sutherland & Company, a copartnership, respectfully represents and alleges:

1. That your petitioner is and has been at all times herein mentioned a copartnership composed of Le Baron S. Willard and John E. Sutherland, engaged in the mining and shipping of Pennsylvania and West Virginia steam and gas coal; having its office and principal place of business in the Maritime Building, 8-10 Bridge Street, New York, and operating branch offices in Philadelphia, Baltimore, Newport News, Norfolk and Boston.

2. That on June 5, 1916, the United States through the Navy Department entered into a contract with the claimant, being
2 Contract No. 26492 for "furnishing the following articles to be delivered at the place and within the time stated for each class, and at the price set opposite each item, respectively, and unless otherwise provided, to be subject to the terms of the above contract quoted on the back hereof;"

That pursuant to the express terms of the contract the claimant was to furnish 10,000 tons of steaming coal for delivery f. o. b. vessels or barges under chutes at respective piers Hampton Roads, Virginia, at $2.85 per ton, or a total for the 10,000 tons of $28,500.

A true and correct copy of the said contract is hereto attached and made a part hereof, marked Exibit "A."

3. That at the time of the making of the said contract, the United States, in order to require claimant to deliver only such portion or portions of said coal so contracted for, as might be needed for the naval service at the place named and for the period of the contract, and also in order to relieve the United States from liability for failure to order the full amount of said coal, so contracted for caused the following provisions to be incorporated in said contract, to wit:

"It shall be distinctly understood and agreed that *that* it is the intention of the contract that the contractor shall furnish and deliver

any quantity of the coal specified which may be needed for the na
service at the places named during the period from July 1, 19
to June 30, 1917, irrespective of the estimated quantity stated,
government not being obligated to order any specific quantity."

4. That the 10,000 tons of coal so contracted for, was but a sm
portion of the quantity stated in the Proposal for Bids issued by
Navy Department, and in thus submitting a bid for a port
3 of the entire quantity, the claimant was acting in accorda
with the following provision of the said Proposal:

"Bids on less than the entire quantity of coal specified under e
clause will be received and considered. Such partial bids must s
the amount of tonnage it is proposed to furnish, subject to the ot
conditions of the specifications."

5. That by letter of March 26 1917, the United States thro
the Navy Department represented by the Paymaster General of
Navy, notified the claimant that pursuant to the quantities cla
and the general specifications of the contract, the partial tonn
to be required under the contract would exceed the quantity sta
by about 10%, and in accordance with this construction, the Uni
States through the Navy Department subsequently insisted upo
delivery at Hampton Roads, Virginia, of 1,000 tons in addition
the 10,000 tons specified in said contract.

6. That the claimant in numerous letters and telegrams protes
against the construction thus imposed upon the contract and den
its liability under said contract to be required by the Navy Dep
ment to supply such additional coal.

7. That the United States acting through its said Navy Dep
ment and relying upon a portion of the provisions of said cont
set out in section 3 of this Petition, asserted and claimed that cla
ant was required by the terms of said contract to accept and sup
orders for additional coal in excess of the amount expressly sta
in the contract.

8. That the United States through its said Navy Departm
notified claimant that its need for said coal was immed
4 and urgent and that it was the intention of the United Sta
in case of refusal or failure by claimant to promptly sup
said tonnage, to purchase said coal on the open market and cha
the purchase price thereof to the claimant's account.

9. That thereafter claimant, still so denying the right of
United States to require claimant to furnish such additional tonna
and still protesting against being required so to do under the ter
of said contract, by reason of and because of the immediate a
urgent need of the United States for said coal, and by reason of
declared intention of the United States to purchase said coal on
open market and charge the purchase price thereof to claimar

account, delivered the excess tonnage to the Navy Department of the same quality and grade as specified under the contract.

10. That the claimant in order to supply the 1,000 tons excess tonnage required by the United States acting through the said Navy Department, was obliged to purchase same in the open market, and that at the time of said purchase, on or about the 23d day of June, 1917, the price per ton was $6.50 or $3.65 in excess of the price stated in the contract.

11. That the United States asserted the right to require claimant to accept the price provided for in said contract for the coal so furnished in excess of the tonnage provided for in said contract. That claimant refused to accept contract price for said excess tonnage and demanded payment of the market price at the time of purchase for delivery to the Navy Department. That the United States paid to the claimant a sum of money equal to the value of said additional tonnage if furnished under said contract, which sum claimant accepted and has credited to the account of the United States as partial payment for said coal. That the United States has refused to pay claimant the difference between the said contract price and the market value of said coal and that the amount of such difference is $3,650.00.

12. That no action upon your petitioner's foregoing claim has been had before Congress or either House thereof. That said claim was presented to the Navy Department and payment thereof refused by said Department. That claimant appealed to the Treasury Department and that said Treasury Department refused to authorize the payment of said claim; that the claimant is the sole owner thereof and the only party interested therein and that no assignment or transfer of the said claim or any part thereof or any interest therein has been made; that this claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; and that this claimant has at all times borne true allegiance to the Government of the United States and has not, in any way, aided or abetted or given encouragement to rebellion against the said Government.

Wherefore your claimant prays

1. That the Court will render a judgment against the United States in favor of your claimant for the payment by the United States to your petitioner of the said sum of $3,650.00.

2. That your claimant may have such other and further relief as justice and the exigencies of this case may require.

WILLARD, SUTHERLAND & COMPANY,
By LE BARON S. WILLARD.

BAKER & BAKER,
Attys. of Record.

6 STATE OF NEW YORK,
County of New York, ss:

Before me, a Notary Public, in and for the State and County aforesaid, personally came Le Baron S. Willard who being duly sworn saith that he is a partner in and President of Willard, Sutherland & Company, petitioners in the foregoing petition and that the statements therein are just and true to the best of his information and belief.

Sworn and subscribed to before me this 30th day of October, 1919.

[SEAL.] G. A. ROBERG,
Notary Public.

Notary Public of Kings County.
Certificate filed in N. Y. County.
New York Co. Clerk's No. 199.
New York Co. Register's No. 1264.
Kings Co. Clerk's No. 205.
Kings Co. Register's No. 1080.

EXHIBIT "A."

N. S. A. 505.
Contract No. 26,492.
Opening May 5, 1916.

Navy Department,

Bureau of Supplies and Accounts,

Washington, D. C., June 5, 1916.

SIR:

A contract numbered as stated above and dated June 5, 1916, has been entered into with Willard, Sutherland & Co., of 8-10 Bridge St., New York, N. Y., for furnishing the following articles to be delivered at the place and within the time stated for each class, and at the price set opposite each item, respectively, and, unless otherwise provided, to be subject to the terms of the above contract quoted on the back hereof:

7 Respectfully,

S. McGOWAN,
Paymaster General of the Navy.

To Willard, Sutherland & Co., 8 Bridge St., New York, N. Y.

4-1937.

Class 18.—(Bu. Req'n 3, 1917, G. A. A., Naval Supply Account, S. and A.—Sch. 9485.)

To be delivered as specified below at such times and in such quantities as may be required during the fiscal year ending June 30, 1917.

Stock classification No. 8.

7. 10,000 tons steaming coal, as follows:

a. For delivery f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Va., per ton, $2.85.. $28,500
b. For delivery f. o. b., vessels under chutes at piers Philadelphia, Pa., — per ton.....

For extra charges for all work done, if required, on reasonable notice, in loading from Government barges, trimming and stowing into bunkers of the United States hospital ship Solace and other Government-owned vessels not in position to handle their own coal, per ton of 2,240 pounds, as follows:

a. In Hampton Roads, Va., in regular bunkers, $— per ton.
b. In Hampton Roads, Va., in side bunkers, $— per ton.
c. In Norfolk Harbor, Va., in regular bunkers, $— per ton.
d. In Norfolk Harbor, Va., in side bunkers, $— per ton.

8 As per railroad tariffs:
Unit prices only are desired.

If barges other than Government barges are used for any deliveries at Hampton Roads, within Norfolk Harbor limits, the Government will pay an additional charge of (to be inserted by bidder) —— per ton for barging and towing.

Each bidder must insert in the blank spaces the following information regarding the coal he proposes to furnish, without which information the proposal will be informal:

a. British thermal units per pound of "dry coal"..... 14,800
b. Percentage of ash in "dry coal"..... 6
c. Percentage of sulphur in "dry coal"..... .90
d. Percentage of volatile matter in "dry coal"..... ..
e. Percentage of moisture in coal as received..... 2

For extra charges for all work done, if required, on reasonable
C. For delivery F. O. B. cars at the mines, per ton, $1.45.

For best quality of New River run-of-mine steam coal from properties located in Fayette and Raleigh Counties, West Virginia, operating the Sewell, Fire Creek and Beckley Coal Veins from any or all of the following mines:

Turkey Knob.	Lanark 3 & 4.	Mill Creek.
Eccles 3, 5 & 6.	Sun 1, 2 & 3.	Piney 1, 2, 3 & 4.

General Specifications and Conditions Governing All Classes of this Schedule as Applicable.

Quantities Estimated.

It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver
9 any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quanti-

ties stated, the Government not being obligated to order any specific quantity.

The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only, and are not to be considered as having any bearing upon the quantity which the Government may order under the contract.

Quality.

Coal to be the best quality, steaming, semi-bituminous, run of mine, with at least 40 per cent lump, suitable and acceptable for use of the naval service.

Coal must be dry and practically free from slate, dirt, sulphur, and other impurities, subject to the usual inspection and test, and must weigh 2,240 pounds per ton, the weight to be determined in a manner satisfactory to the Government.

Deliveries.

Deliveries to be made promptly, and in lots or quantities specified for different ports named, on call and at the prices accepted by the Department, irrespective of commercial conditions or business stress, on the order of the Bureau of Supplies and Accounts for its representatives at the different ports of delivery.

Freight Terminal Charges.

In the case of coal delivered at the piers at Hampton Roads, Va., Baltimore, Md., Charleston, S. C., and Philadelphia, Pa., dumping, skidding, trimming, leveling, and wheeling, if required and assessed by the railroad company as additional charges to that covering transportation, will be paid for by the Government for Government-owned vessels only at the rates established by the freight tariffs of the respective railroad companies as accepted by and on file with the Interstate Commerce Commission.

Payments.

Payments at the contract prices will be made from time to time for accepted deliveries.

Reservations.

The Government reserves the right to reject any or all bids and in accepting any bids for the different ports of delivery named, the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government.

Notes.

(*a*) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

(*b*) Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes, or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases, the obligation to deliver coal under their contracts will be cancelled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from the inability to fulfill their contracts on account of the aforementioned causes.

(*c*) The Government will require satisfactory evidence that all coal delivered under each contract has been furnished from the mines accepted.

11 (*d*) Bidders must designate the commercial name of the coal, the name or other designation of the coal bed or beds, and the name and exact location of the mine or mines from which they propose to supply the coal bid upon, and put this information in a separate sealed envelope accompanying the bid. This envelope will not be opened at the time the bids are made public, and the information will be kept absolutely confidential by the department until the award is made. In case the coal offered is from a mine the name of which has been changed since last bid upon, the bidder will state the old as well as the new name assigned the particular mine.

(*e*) Contractors unable to supply the coal from the mines on which their contracts were made will be permitted to make application to the department for permission to supply coal from other mines in case of special emergency. The department reserves the right to refuse or grant such permission, it being understood that in all such cases where substituted coal is furnished the contractors will be charged with the same responsibility for furnishing acceptable coal as if the coal came from the mines accepted; and the failure of such substituted coal to come up to the requirements of the department will be sufficient cause for cancelling the entire contract.

(*f*) Prices quoted must be net prices and not subject to any increase on account of freight rates.

The terms of the formal contract of number stated on the face hereof and as entered into by the contractor as party of the first part, and the Paymaster General of the Navy, as party of the second part, provide that——

2. It is hereby mutually and expressly covenanted and agreed by and between the parties hereto that the article or articles to be furnished or services to be performed under this contract shall conform in all respects to the requirements of the specifications hereunto annexed, which specifications, the "Instructions, Deliveries, and Conditions," printed on the proposal of the said party of the first part, shall be deemed and taken as forming a part of this contract with like operation and effect as if the same were
12 incorporated herein; and, in any case where the specifications do not explicitly provide to the contrary, all workmanship and materials entering into the manufacture or construction of any article or articles under this contract, shall be of the very best commercial quality and manufacture; and said article, articles, or services shall upon delivery or completion, be subject to inspection and examination by the officer or officers authorized by the said party of the second part to inspect and exam-ne the same; and no article furnished or services performed under this contract shall be accepted until it or they shall have been inspected and approved by such officer or officers; and any of said articles not so approved shall be removed by the said party of the first part at — own expense, and within ten days after notification.

3. It is further covenanted and agreed, as aforesaid, that time is an essential element of this contract, and that, if the said party of the first part shall fail to make delivery of any or all the articles or materials or to perform any or all of the services herein contracted for, in conformity with the conditions and requirements of the contract, and within the time or times prescribed, the said party of the second part will be damaged thereby; and the amount of said damages is hereby fixed and agreed to in advance, as liquidated damages and not as penalty, and the said party of the second part shall make deductions from the contract price accordingly, as follows, viz:

For each day's delay, Sundays and holidays excepted, until satisfactory delivery or performance shall have been made, or until such time as the party of the second part may procure the same as hereinafter provided, at the rate of one-twentieth of 1 per cent of the contract price, the deductions, however, not to exceed in any case 10 per cent of the stipulated value of the articles or materials not so delivered, or of the services not so performed; rejection of deliveries or performance not to be considered as waiving deductions: Provided, That no liquidated damages shall be deducted for such period, after the expiration of the time or times prescribed for delivery or performance, as, in the judgment of the party of the second
13 part, shall equal the time that, either in the beginning or in the prosecution of the deliveries or services contracted for, shall have been lost on account of any cause for which the United States is responsible, or on account of strikes, riots, fire, or other disaster, delays in transit or delivery on the part of the transportation companies, or any other circumstances beyond the control of the contractor, but such circumstances shall not be deemed to include

s on the part of sub-contractors in furnishing materials when delays arise from causes other than those herein specified. provided further, That the question whether delays are due to s herein specified shall be determined by said party of the d part.

It is further covenanted and agreed that if the said party of irst part shall fail in any respect to perform the contract the may, at the option of the United States, be declared null and without prejudice to the right of the United States to recover lefaults therein or violations thereof, or the said party of the d part may purchase or procure in such manner and from such n or persons as he deems proper, paying such price therefor as be necessary in order to procure the same, such of said articles aterials of the kind specified as near as practicable, or procure erformance of such services, as the said party of the first part fail to deliver or perform as required, and may demand and ver from the said party of the first part the difference between price so paid therefor and the price stipulated in the contract, the amount of such difference shall be paid by the said party he first part to the said party of the second part on demand.

. It is further covenanted and agreed that the said party of the part shall indemnify the United States, and all persons acting er them, for all liability on account of any patent rights granted the United States that may be affected by the adoption or use of articles herein contracted for.

. It is further covenanted and agreed that in carrying out the provisions of the contract no person shall be employed who is undergoing sentence of imprisonment at hard labor which has been imposed by a court of the United States or of any te, Territory or municipality having criminal jurisdiction; that e contract is upon the express condition that no Member of or legate to Congress, nor any person belonging to or employed in e naval service is, or shall be, admitted to any share or part therein to any benefit to arise therefrom except as a member of a corporan; and that any transfer of the contract, or any interest therein, any person or party by the said party of the first part shall annul e same, so far as the United States is concerned.

7. And this contract further witnesseth, That the United States, arty of the second part, in consideration of the foregoing stipulaons, do hereby covenant and agree, to and with the party of the rst part, as follows, viz:

That upon presentation of the customary bills, and the proper vidence of the delivery, inspection and acceptance of the said rticle, articles, or services, and within ten days after such evidence hall have been filed in the Bureau of Supplies and Accounts, there hall be paid to the said contractor or to his order, by the Navy Pay fficer at Washington, D. C., (Disbursing Office), the sum found ue for the articles delivered or services performed under this conract; provided, however, That no payments shall be made on any

one of said classes until all the articles or services embraced in such class shall have been delivered or performed and accepted, except at the option of the party of the second part.

4-1937.

15 II. *General Traverse.*

Filed Jan. 5, 1920.

No demurrer, plea, answer, counterclaim, setoff, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On October 18, 1921, this case was argued and submitted on merits by Mr. Gibbs L. Baker, for the plaintiff, and by Mr. Alexander H. McCormick, for the defendant.

16 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered November 7, 1921.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a copartnership composed of Le Baron S. Willard and John E. Sutherland, doing business under the firm name and style of Willard, Sutherland & Company, and is and was engaged in the mining and shipping of coal with its principal place business in the city of New York and with operating branches in Philadelphia, Baltimore, Newport News, and Boston.

II.

In the spring of 1916 the Navy Department, being desirous of procuring contracts for coal for that department for the next ensuing fiscal year to be delivered in varying quantities at different stations, issued its invitation for bids in the form of a schedule numbered 9485, containing general specifications and conditions and printed forms of proposals for deliveries in stated quantities at ten different ports or stations. Included therein and designated as "class 18" was a form of proposal for the furnishing of 600,000 tons of steaming coal to be delivered f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Virginia.

eneral specifications contained the following provisions under
ead "Quantities estimated":

all be distinctly understood and agreed that it is the inten-
he contract that the contractor shall furnish and deliver any
of the coal specified which may be needed for the naval
t the places named during the period from July 1, 1916, to
, 1917, irrespective of the estimated quantities stated, the
nent not being obligated to order any specific quantity.
estimated quantities have been arrived at from the records
f previous purchases. While they represent the best infor-
nation obtainable as to the quantities which will be required
uring the period covered by the contract, they are estimated
l are not to be considered as having any bearing upon the
which the Government may order under the contract."

r the subhead "Reservations" appeared the following:

Government reserves the right to reject any or all bids, and
ting any bids for the different ports of delivery named the
also reserved to make such distribution of tonnage among
rent bidders for suitable and acceptable coals for the naval
s will be considered to be for the best interests of the Gov-
."

r the subhead "Notes" appeared the following:

Bids on less than the entire quantity of coal specified under
ss will be received and considered. Such partial bids must
e amount of tonnage it is proposed to furnish, subject to the
nditions of these specifications."

III.

laintiff upon said form submitted its proposal for the furnish-
10,000 tons of said 600,000 tons at $2.85 per ton and was
of the acceptance of its proposal to furnish said amount.
e 5, 1916, a contract numbered 26492, and made a part of
tion herein by reference as Exhibit A, was entered into be-
he parties. The contract in its physical construction was
p largely of portions of the general specifications, notes, etc.,
e printed proposals contained in said schedule numbered
hich were clipped therefrom and pasted on and thus made
of the contract and the paragraphs quoted in Finding II,
us made a part thereof.

IV.

March 26, 1917, plaintiff was informed by the Paymaster
of the Navy that it had been ascertained that the quantity
d in its contract would be exceeded by about ten per cent.
y to this communication the plaintiff stated that the notice
d, issued to it upon the day of the opening of the bids, had
ally mentioned 10,000 tons, and that when it had furnished

said amount it would consider its obligation under its contract discharged; that it was prepared to furnish the balance due under its contract upon notice. In reply thereto the Paymaster General of the Navy cited quoted provisions of the contract as authority for the requiring thereunder of an additional tonnage over and above the 10,000 tons, stated that the excess tonnage required was being prorated and the same requirements were being made of other contractors and expressing the hope that it would not be necessary to resort to extreme measures to accomplish compliance.

The steamer Kennebec had been directed to load coal with the plaintiff company about June 11, 1917, of which plaintiff had been informed, and that the quantity required of it for this purpose would be 2,180 tons. On the 1st of June, 1917, plaintiff informed the Navy Department that the balance due under its contract was 560 tons, which it was ready to supply at any time, and on June 2d, 18 in response to a telegram from the Paymaster General of the Navy, the plaintiff again stated that the balance due was 560 tons and that this amount was all that it was able to furnish, and that that amount would complete the amount required of it under its contract. On June 6th the Paymaster General informed the plaintiff that the full cargo assigned to the Kennebec must be furnished, in reply to which plaintiff stated that its contract specified 10,000 tons, that it had delivered 9,440 tons, and that the balance of 560 tons was available at any time. On June 9th the Paymaster General advised the plaintiff that failure to supply the tonnage ordered would necessitate immediate purchase in the market for its account, in reply to which, on July 12th, the plaintiff stated that it had arranged to supply to the Kennebec the full quantity required and that it was "doing this under protest which can be straightened out later," and on June 14th the plaintiff by letter informed the Navy Department that it would agree to supply 2,180 tons ordered for the Kennebec, with the understanding that no further assignments would be made to it, that it would thereby be furnishing 1,620 tons more than it was obligated to furnish under its contract, which it was furnishing under protest, and reserving the right to take proper steps in due course for the recovery of the difference between the current market price of the coal and the contract price, and requesting confirmation of the above from the Navy Department upon receipt of which it would give the necessary orders for the loading of 2,180 tons on the Kennebec. On June 15th the Paymaster General acknowledged receipt of the plaintiff's letter of the 14th, but not acceding to any proposition therein contained, directed plaintiff as follows:

"Your company will please supply Kennebec with fifteen hundred sixty tons coal, or such quantity as may be necessary to bring the total tonnage delivered by you under contract twenty-six four ninety-two up to total estimated quantity plus ten per cent, or total eleven thousand tons. Balance Kennebec cargo will be obtained elsewhere."

V.

aintiff thereupon furnished to the steamer Kennebec 1,560
al, making the aggregate amount of coal furnished to the
ates 11,000 tons. At the time that this amount of coal
shed to the Kennebec the market value thereof was $6.50
ton; 1,000 tons of coal then furnished by the plaintiff to
ebec was worth in the market $3,650 in excess of the con-
e therefor.

Conclusion of Law.

he facts found the court concludes, as a matter of law, that
iff is not entitled to recover and that its petition herein
e dismissed with judgment against it for the cost of print-
taxed by the clerk, and judgment is directed accordingly.

Opinion.

r, *Judge*, delivered the opinion of the court:
aintiff seeks to recover the difference between the market
lue of 1,000 tons of coal delivered to the defendant and the
ount it was paid therefor under a contract under which
e defendant then contended and now contends that it was
o furnish it.
contracts for coal for the fiscal year 1917, the Navy De-
issued a "schedule" containing general specifications,
., and ten printed forms of proposals bearing different
mbers, each applicable to a different port or station and
aining therein in print the estimated amount needed at the
rt or station. Among them was a form of proposal, "class
he furnishing of 600,000 tons of steaming coal for delivery
on Roads.
) of the general provisions in the schedule, applicable gen-
all classes, provided that—
n less than the entire amount of coal specified under each
be received and considered. Such partial bids must state
nt of tonnage it is proposed to furnish subject to the other
s of these specifications."
aintiff bid to furnish 10,000 tons at $2.85 per ton, the bid
mitted on the prescribed form by inserting "10,000" in
e "600,000" printed therein. It was notified of the accept-
s bid for 10,000 tons, and a contract was entered into made
ally of the bid and portions of the specifications, condi-
notes clipped from the "schedule" and pasted on and thus
art of the contract.
aintiff's contention is that under the clause (*a*) above
elected to and did submit its bids to furnish 10,000 tons of
ated required amount of coal; that its bid was accepted for
ns; and that under its contract it had discharged its con-
gation when it had furnished that amount and could not

be required to furnish more. The defendant maintains that by reason of certain provisions in the contract it had the right to require of the plaintiff under its contract the 1,000 tons in question. A construction of the contract in this respect is therefore necessary.

It is unfortunate that in matters of such moment the United States must resort to such a patchwork method of constructing a contract rather than to simple and plain English so used as to express clearly the mutual rights and obligations of the parties to the avoidance of such controversies.

It seems to us quite pertinent as bearing upon the proper determination of plaintiff's obligation under the contract in question to consider the situation as it would have been had one party, the plaintiff or anyone else, bid to furnish the entire 600,000 tons stated in the submitted form of proposal and, upon acceptance of its bid, entered into a contract in the form now under consideration. What would have been the limits of the contractor's rights and obligations? Would the contract of necessity be construed as for the specific amount named or might there be a variance dependent on the needs of the naval service at that port?

In such circumstances note (a) would have had no office to perform, but other conditions stated in the schedule and incorporated in the contract, as they are in this instance, would be vital.

It sufficiently appears that the contracts sought are annual contracts for supplying the estimated needs of the Navy at certain named ports and stations during the ensuing fiscal year. Such needs, it will be conceded, could not be accurately stated in advance. Past experience, any known change in conditions being considered, furnished the best index. The general conditions incorporated in the schedule under the head "Quantities estimated" and incorporated also in the contract, contained these provisions:

"It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity.

"The estimated quantities have been arrived at from the records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only, and are not to be considered as having any bearing upon the quantity which the Government may order under the contract."

The first paragraph of the quotation may be passed as immaterial here since it is designed simply to relieve the Navy Department from obligations to take any part of the estimated quantity which it may not need. The second paragraph informs bidders that the quantities stated are estimated only and states the basis of the estimate which it is said furnishes the best information obtainable "as to quantities which will be required during the period covered by the contract." "Required," beyond question, by the Navy Department

ach instance, the port or station named. And following is specific provision that they, the estimated quantities, "are considered as having any bearing upon the quantity which ernment may order under the contract."

porated in an annual contract entered into by a bidder who to furnish the entire estimated quantity of 600,000 tons, e be any doubt that these provisions would relieve the Gov- from ordering more than 500,000 tons if perchance no more ded or would permit it to order and require the contractor sh 700,000 tons if needed by the Navy Department at this If one contract had thus been made for the entire estimated it is not at all likely that such a question as is here presented ver have arisen. Contracts indefinite in quantity but meas- a need are enforceable to the extent of the need. Brawley v. States, 96 U. S. 168.

contention of the plaintiff is predicated on note (*a*) quoted nd the fact that thereunder it bid to furnish 10,000 tons. ct of that clause is for consideration, not standing alone, but ght of the other provisions just discussed and other pertinent And the discussion of the effect of the other provisions upon is abbreviated, in fact practically rendered needless, by the ing words of the note which attach to the required state- to the amount it is proposed to furnish, the further condition be a statement of the amount it is proposed to furnish, *to the other conditions of these specifications.* (Italics ours.) re not permitted to disregard this language. There is nothing repugnancy or inconsistency. And given its plain meaning it must require that the conditions discussed as applicable to an assumed contract for the entire estimated needs apply to a contract such as this for an apportioned part thereof.

readily to be urged that such a construction imposes a burden s of that intended to be assumed and perhaps beyond the pos- of performance. That, under such a construction, one pur- to supply a minor part of an estimated need might be required ly the entire need. We need not discuss an assumed case of e possibilities. We are limited in our needs for present pur- a construction of this contract in the light of all its provisions extent of determining whether it imposed on the plaintiff the ion asserted by the defendant.

estimated quantity of coal needed was large. It was evidently plated, as found to be the case, that bidders not able to fur- e entire quantity might desire to furnish a part thereof. And o doubt contemplated that from all the bids received the Gov- it would award such acceptances as in the aggregate would be nsurate with its estimated needs. Would it be reasonable to that the Government, specifically declaring with reference to oposal for the entire amount that it could only estimate its and that its estimate should not be considered as having any on the quantity which might be ordered, would attempt when ted its needs to a dozen bidders to contract severally and hence aggregate for a specific amount?

It was provided in the general conditions of the schedule incorporated in the contract that such distribution of tonnage among "the different bidders for suitable and acceptable coals for the naval service" might be made as should be considered for the best interests of the Government, and when the distribution was made it was evidently the intention to apportion the obligation of supplying the needs rather than to apportion a specific quantity.

If the conclusion was right that under a single assumed contract for the entire estimated amount, with the attendant conditions attached, the Government might have ordered but 500,000 tons, or, on the other hand, might have required the furnishing of 700,000 tons if it needed that amount, the conclusion must follow that under an apportionment plan the plaintiff must assume its proportionate part of the entire obligation and be subject pro rata to the same requirement. This is all that was required of it and for present purposes we are not concerned with any question as to the result had the attempt been made to impose on it the burden of some other contractor. The correspondence clearly indicates an intention to equitably distribute the burden as to the needs in excess of the estimated quantities and shows that the requirement of the plaintiff was in direct proportion to the total excess needs over the estimated quantity.

We are, therefore, of the opinion that no more was required of the plaintiff than might rightfully be required under its contract and the case might be permitted to rest upon that proposition, but, if we should assume for the sake of the argument that this conclusion is not tenable, there is yet another ground upon which it must be held that the plaintiff cannot recover.

It maintains and the record shows that it furnished this additional 1,000 tons of coal under protest and that it specifically reserved the right to take proper steps for the recovery of the difference
22 between the market and the contract price of the coal. Assuming that it was not obligated under the contract to furnish this additional amount, can a mere protest give it any rights of recovery in the face of the fact that it did furnish in response to a specific demand that it should furnish it under the contract? There was never at any time any other attitude on the part of the representative of the Government than that the plaintiff was obligated under its contract to furnish the coal in question. At all times the demand was that it be furnished under the contract and the plaintiff so understood the demand. There was nothing in the whole transaction from which could be inferred any intention on the part of the officer in charge for the defendant to purchase or pay for this coal otherwise than under the contract. The minds of the parties never met upon any proposition in that respect and, immaterial though it may be, the officer in charge never even gave recognition to the plaintiff's attempt to reserve a right to seek recovery of additional compensation.

What, then, must be the conclusion? The defendant demanded the coal under the contract and the plaintiff furnished the coal. If the plaintiff under such circumstances has any rights of recovery, it must be because its protest against a demand with which it need not comply gave it that right. We do not think a protest in such

cumstances can serve any such purpose. The plaintiff's right s to refuse to deliver the coal in response to the demand made. It is fully realized that the invoking of such a doctrine must in ne cases work a hardship, for in troublous times patriotic citizens loth to refuse the demands of their Government even though they y seem to them to be unwarranted, but it is our province only to nounce the law of the case as we believe it to be.

Upon either or both of the grounds stated we must conclude that e plaintiff is not entitled to recover.

Graham, Judge; Hay, Judge; Booth, Judge; and Campbell, Chief stice, concur.

V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Sev- th day of November, A. D., 1921, judgment was ordered to be tered as follows:

The Court, upon due consideration of the premises find in favor the defendant, and do order, adjudge and decree that Willard, therland and Company, as aforesaid, are not entitled to recover y sum in this action of and from the United States; and that the tition herein be and the same hereby is dismissed; And it is fur- er ordered, adjudged and decreed that the United States shall have d recover of and from the plaintiff, as aforesaid, the sum of One ndred and forty-nine dollars and twenty-eight cents ($149.28), e cost of printing the record in this court, to be collected by the erk, as provided by law.

By THE COURT.

VI. *Plaintiff's Application for and the Allowance of an Appeal.*

From the judgment rendered in the above-entitled case on the venth day of November, nineteen hundred and twenty-one, the aintiff by its attorneys on the 14th day of November, nineteen ndred and twenty-one, makes application for and gives notice of i appeal to the Supreme Court of the United States.

BAKER & BAKER,
Attorneys for Plaintiff.

Filed Nov. 14, 1921.

Ordered: That the above appeal be allowed as prayed for.
Nov. 14, 1921.

By THE COURT.

24 Court of Claims.

No. 34222.

WILLARD, SUTHERLAND & COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the finding of fact, conclusion of law and opinion of the Court by Downey, J.; of the judgment of the Court; of the plaintiff's application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifteenth day of November, A. D., 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,576. Court of Claims. Term No. 621. Willard, Sutherland & Company, appellant, vs. The United States. Filed November 17th, 1921. File No. 28,576.